

D.R. No. 2008-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

ATLANTIC COUNTY PROSECUTOR'S OFFICE,

Public Employer/Petitioner,

-and-

Docket No. CU-2007-7

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1034,

Employee Representative.

Synopsis

The Director of Representation clarifies a unit of assistant prosecutors to include the titles of chief assistant prosecutor and supervising assistant prosecutor. The Director found that the disputed titles are neither supervisors nor managerial executives within the meaning of the Act.

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Appearances:

For the Public Employer/Petitioner,
Eric M. Bernstein & Associates, attorneys
(Deborah Bracaglia, of counsel)

For the Employee Representative,
Weissman & Mintz, attorneys
(Annmarie Pinarski, of counsel)

DECISION

On August 3, 2006, the Atlantic County Prosecutor's Office (Prosecutor or Employer) filed a Petition for Unit Clarification seeking to exclude the titles: chief assistant prosecutor and the supervising assistant prosecutor, encompassing seven employees, from the certified negotiations unit of assistant prosecutors represented by Communications Workers of America, Local 1034, AFL-CIO (CWA).

The Prosecutor contends that the disputed titles are supervisors and managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1

et seq., and must be excluded from the CWA unit. CWA argues that they are neither supervisory nor managerial and should be included in the unit.

Background

On April 20, 2006, CWA filed a representation petition seeking to represent the assistant county prosecutors. The parties were unable to agree on whether the chief assistant prosecutors and the supervising assistant prosecutor should be included in the unit.

On July 21, 2006, I issued a decision finding in part that resolution of the dispute regarding the eligibility of the seven disputed employees was not a prerequisite to certifying CWA as a majority representative of assistant prosecutors, based upon a card check. Atlantic Cty Prosecutor's Office, D.R. No. 2007-2, 32 NJPER 264 (¶108 2006). I also found that CWA had submitted authorization cards from a majority of assistant prosecutors (with or without the disputed employees). Consequently, CWA was certified as the majority representative of this negotiations unit:

Included: All assistant prosecutors employed by the Atlantic County Prosecutor's Office.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; non-professional employees, craft employees, police, casual employees, and all other employees.

I wrote that following the certification, either party could file a unit clarification petition to determine the eligibility of the two titles for the new unit. This petition ensued.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2 and 2.6. The parties have filed certifications and briefs the last of which was received on April 11, 2007. These facts appear:

Table of Organization

The Atlantic County Prosecutor was Jeffrey Blitz and was recently succeeded by Theodore Housel. The First Assistant Prosecutor is Murray Talasnik and the disputed six chief assistant prosecutors (chiefs) and one supervising assistant prosecutor report to him. The disputed titles have virtually identical job duties. (I will refer to the chief assistant prosecutors and supervising assistant prosecutor as "chiefs"). Also employed are 37 assistant prosecutors and a staff of investigators and clerical employees.

Chief Jill Hornberger heads the major crimes litigation unit, which has five teams of assistant prosecutors and an unspecified number of investigators and support staff. Chief Jim McClain heads the investigations unit, which includes four assistant prosecutors (attorneys). Chief Ellen Loughney supervises the sexual assault unit, which employs one prosecuting attorney. Chief Jeff Nearey heads the juvenile unit, which

includes two attorneys. Chief Betsy Phillips supervises the special litigation unit, which has five attorneys. Dana Litke, the Supervising Assistant Prosecutor, runs the domestic violence/Grand Jury unit which consists of two sections: domestic violence with two attorneys assigned; and Grand Jury, with seven attorneys assigned. Chief Cary Shill supervises the operational unit, which includes four sections: intelligence, violent crimes, narcotics and computer crimes. One or two attorneys are assigned to each of the sections.

Policies/Discretion

The chiefs and supervising assistant do not develop policies in the prosecutor's office. They have no authority to make significant purchases or to pledge the employer's credit. For example, they cannot approve funds for trial services. They do not participate in the budget process. They have no authority to determine the number of staff positions or take steps to fill vacancies. They have no control over hiring and do not set employee performance criteria. They cannot approve employee time-off or requests to attend seminars or training, although they prepare daily attendance records.^{1/} Reassignments and transfers of staff either within the sections or between sections are determined by the Prosecutor and First Assistant. Trial

^{1/} Certifications from the chiefs assert that they do have such authority, but the certification from the first assistant prosecutor certifies that they do not have this authority.

Section Chief Hornberger has the authority to arrange coverage if a trial attorney is absent. In the trial section, the largest section in the agency, the First Assistant has called for and held staff meetings of the section.

Professional Discretion

The Employer contends that the chiefs exercise considerable discretion in determining which cases will be brought to trial and which will be dismissed, and whether a crime should be charged, and if so, the degree of crime to be charged. The chiefs recommend to the Prosecutor which cases to charge as criminal homicides, and which statutes to apply to them.

The Prosecutor or First Assistant only has authority to approve a dismissal of an indictment, any plea bargain in homicide cases, and any sentencing agreements outside the parameters of the "No Early Release Act," "Megan's Law" or the Attorney General's Brimage Guidelines for drug offense sentencing. Chiefs must seek their approvals on all such dispositions. The Prosecutor or First Assistant must also approve funding for trial services. Trial Section Chief Hornberger directs the investigations of the trial unit and approves search warrant submissions to the courts. The ten assistant prosecutors in the trial section submitted certifications providing that the First Assistant Prosecutor "supervises" the trial section. Affidavits of 19 assistant

prosecutors all provide that each was never informed that the chiefs had the authority to recommend or impose discipline. The chiefs are responsible for ensuring staff compliance with the Prosecutor's policies, procedures and performance standards. The employer asserts that the chiefs also have "significant input" into the formulation or modification of policies. First Assistant Prosecutor Talasnik's February 6, 2007 affidavit gives three examples of the chiefs' input: (1) A recent statutory amendment permitted judges to waive or partially waive suspension of an individual's driving privileges upon conviction of a drug offense, if the suspension causes "undue hardship." First Assistant Talasnik met with several of the chiefs to discuss what factors should be considered in defining "undue hardship." They had significant input into the policy, which is now being used in the Prosecutor's office in narcotics cases; (2) The Prosecutor had a "zero tolerance" policy requiring that any alleged drug offense would be presented to the grand jury. Chief Dana Litka advised Talasnik that the grand jury was often resistant to indicting individuals for minor drug offenses. The Prosecutor, Talasnik and Litka met to discuss the issue. As a result of the meeting, the Prosecutor changed the policy to permit discretion not to present "de minimus" drug offenses to the grand jury. (3) New legislation requires motor vehicle accidents involving serious bodily injury to be transferred from municipal court to

superior court. The Prosecutor met with Talasnik, Chief Litka and Chief McClain to discuss the development of guidelines to implement the legislation. As a result of the meeting, a comprehensive policy was adopted.

Supervisory Responsibilities

The chiefs and supervising assistant have no role in the hiring process. Nor do they have the power to terminate employees. No evidence indicates that chiefs have ever recommended termination, major discipline, a written reprimand, or even a notation in an employee's personnel file.

The Employer argues that chiefs regularly monitor the assistant prosecutors, supervising and verbally counseling them when they observe inappropriate conduct or actions contrary to policy. First Assistant Prosecutor Talasnik's affidavit cites a few examples of such corrections. Chief Hornberger advised an assistant about her courtroom attire. Chief Phillips counseled one of her assistant prosecutors about a discovery dispute she was having with a defense attorney. Another chief advised an assistant prosecutor to stand when addressing the court.

[Talasnik's February 2 affidavit, para. 2 and 8]. The Employer contends that the chiefs' counselings obviate the need for more formal discipline that would generally be recorded in an employee's personnel file. The Employer also maintains that the chiefs are responsible for ensuring that the assistant

prosecutors they supervise comply with the policies, procedures and performance standards set by the Prosecutor [Affidavit of Prosecutor Jeffrey Blitz; Talasnik affidavit of February 2].

The chiefs assign cases to attorneys in their section and monitor the workload. They review requests for time-off, but do not have the authority to approve them. The chiefs train attorneys newly assigned to their sections, act as mentors to the staff and schedule outside training. They also maintain a case load of their own.

Evaluations

No formal evaluation procedure had existed for the legal staff before 2004.^{2/} On January 9, 2004, First Assistant Prosecutor Talasnik issued a memorandum to all legal staff outlining new procedures for written evaluations. The memorandum directed that, beginning that year, assistant prosecutors would be evaluated annually by the chief or supervising assistant in charge of their respective sections. The chief was to complete the evaluation form, review it with the attorney being evaluated, then have the first assistant prosecutor review the evaluation, after which it would be placed in the attorney's personnel file. The memo further specified that the first assistant would be

^{2/} Talasnik states in his affidavit, paragraph 7, that the evaluation process was also followed in 2003. However, affidavits submitted by CWA dispute that there was any written process before 2004.

responsible for documenting and attempting to resolve any dispute over the substance of the evaluations before they were added to each attorney's personnel file. The evaluation form solicits a rating of the employee's workload (light/average/heavy) and the type of assignments (easy/normal/complex). It also solicits an employee rating of 1 to 4 in seven areas:

- professionalism;
- productivity/organization/time management;
- job knowledge/application;
- written communication skills;
- oral communication skills;
- initiative/innovation;
- interpersonal skills/teamwork;
- overall evaluation.

A narrative section permits the evaluator to more particularly critique areas identified for improvement and to add other written comments. A sample evaluation was submitted from six of the seven sections [Exhibits D through I].

Staff attorneys were evaluated with the new procedure in 2004 and again in 2005. No written evaluations were conducted in 2006. The Prosecutor believed that there had been too much turnover and reassignment among the staff to permit fair evaluations that year. On January 17, 2007, Talasnik issued a memorandum directing the chiefs to complete the annual evaluations within their respective sections, using the 2004 procedures, and to review them with him. The sample evaluations submitted were all signed by the chiefs and the First Assistant Prosecutor. The First Assistant wrote his assessments on three

of the six evaluations; he wrote of the possibility of promotions on two evaluations and on the third he recounted the employee's disrespectful manner, insubordination, and unprofessional demeanor. None of the evaluation comments by the chiefs recommended discipline, non-retention, transfer or other adverse personnel action. No provision on the form solicits a recommendation of a specific monetary raise, although a few of the evaluation comments noted that monetary rewards were deserved.

No materials submitted by the Employer indicate that Talasnik's review of the evaluations ever resulted in a change or revision of the chiefs' evaluation comments. First Assistant Talasnik generally avers that he and the Prosecutor use the completed evaluations to make salary adjustments, promotions and transfers for the assistant prosecutors. The record however, does not demonstrate any specific example of a nexus between the evaluations conducted by the chiefs and any employee's salary adjustments, promotions, or reassignments.

CWA contends that attorneys receive yearly salary increases on their anniversary dates, irrespective of whether evaluations were conducted. Some attorneys have received "promotional tier increases" even in years, such as 2006, when no evaluations were conducted.

ANALYSIS

The Prosecutor's Office seeks to exclude the supervising assistant prosecutor and the chief assistant prosecutors from CWA's unit, contending that they are managerial executives within the meaning of the Act.

N.J.S.A. 34:13A-5.3 grants public employees the right to organize and collectively negotiate but specifically exempts managerial executives from that right. N.J.S.A. 34:13A-3(f) defines managerial executives as:

. . . persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices. . . .

In New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331 (1997), the State Supreme Court adopted this test to determine managerial authority:

A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of

discretion he exercises. [N.J. Turnpike Auth., 150 N.J. at 356]

The chiefs do not "formulate policy" for the Prosecutor's Office. Certain policies, such as the "No Early Release" program, are issued by the State Attorney General and left to the prosecutor in each county to implement. Other policies are adopted by the Prosecutor in conjunction with the First Assistant. For instance, the decision to have written evaluations for the Prosecutor's legal staff was made by the Prosecutor. The First Assistant directed the implementation of that policy.

The chiefs/supervisor do not "direct the effectuation of policy." They do not have responsibility for developing the methods and means to reach a policy objective. They have no control over the budget, no ultimate authority on staffing decisions, and no ability to commit the Employer's funds. Although they are responsible for ensuring that the Employer's policies are followed within their sections, they do not "coordinate the implementation of policy by line supervisors" (the employees below them organizationally are the staff attorneys and support staff).

The Employer further argues that certain policies were developed or changed based upon "input" from the chiefs. An employee's mere capacity to recommend management policies is not included in the statutory definition of a managerial executive,

nor is it part of the criteria set forth in the State Supreme Court's test in Turnpike. Nor were the chiefs' "recommendations" merely "rubber-stamped" by management. In the instances cited, the Prosecutor and his first Assistant met, together with one or two chiefs, and discussed policy issues. Although the chiefs' suggestions about day-to-day operations may have been helpful in developing a strategy, the Prosecutor decided upon a course of action after the issues were vetted. I cannot agree that the chiefs' "input" into management policies makes them managers under the Act. See N.J. Office of the Public Defender, P.E.R.C. No. 99-60, 25 NJPER 55 (¶30022 1998), req. for recon. den. P.E.R.C. No. 2000-35, 25 NJPER 462 (¶30201 1999) (chief investigators not managerial where they provided input into the employer's policy).

The Employer also asserts that the discretion exercised by the chiefs demonstrates their managerial status. The chiefs apparently have some discretion over prosecutorial decisions, plea bargains and case closure. A level of discretion is expected of senior professional employees with a high degree of specialized expertise. Such discretion within the employee's field of expertise is part of the Commission's definition of "professional employee." N.J.A.C. 19:10-1.1. The chiefs' discretion is not absolute, however. The approval of the Prosecutor or First Assistant is required for a dismissal of an

indictment, plea bargains in homicide cases, and any sentencing agreement outside the parameters of the "No Early Release Act," "Megan's Law" or the Attorney General's Brimage Guidelines for drug offense sentencing. The exercise of the chiefs' professional discretion does not elevate them to the level of management.

Finally, the Employer cites City of Newark, P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), denying rev. of D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), in which section chiefs were excluded from a negotiations unit of city attorneys. In that matter, however, the Commission made no determination that the section chiefs were managerial or supervisory; rather, the parties stipulated that section chiefs would be excluded from the unit.

Based upon the foregoing, I find that the chief assistant prosecutors and supervising assistant prosecutor are not managerial executives within the meaning of the Act.

Supervisory Status

The Employer also contends that the chief assistant prosecutors and supervising assistant prosecutor are statutory supervisors which must be excluded from CWA's unit.

N.J.S.A. 34:13A-5.3 defines supervisors as those employees having the power to hire, discharge, discipline, or to effectively recommend those actions. The mere possession of the

authority is not enough. Somerset Cty. Guidance Center, D.R. 77-4, 2 NJPER 358, 360 (1976). We review all the circumstances of a particular case to determine whether the employee has and regularly exercises such power. Westfield Bd. Of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987), rev'ng H.E. No. 87-57, 13 NJPER 309 (¶18129 1987); City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987); Cherry Hill Tp. DPW, P.E.R.C. No. 30 (1970).

The chiefs and supervisor have no role in hiring. Nor do they have any authority to terminate employees or to impose discipline. No evidence suggests that they have ever effectively recommended termination or taken steps to formally discipline any employee.

The Employer contends that staff attorneys need only day-to-day guidance, direction and counseling from the chiefs/supervisor in their respective sections to adhere to the policies and practices of the Prosecutor's Office. One would not expect highly educated and professional personnel such as assistant prosecutors to need much discipline in the traditional sense. The absence of negative personnel actions shows that the chiefs/supervisor do not meet the first part of the test for statutory supervisor; they do not regularly exercise the authority to hire, fire, or discipline.

The record reveals no instances of chiefs/supervisor having recommended discipline of staff. The chiefs/supervisor are responsible for assigning, directing and reviewing the work of the assistant prosecutors. Acting in a lead capacity, or assigning, directing and reviewing the work of other employees, without more, does not make an employee a statutory supervisor. Hackensack Bd. of Ed., P.E.R.C. No. 85-59, 11 NJPER 21 (¶16010 1985); Franklin Tp., D.R. No. 2002-5, 27 NJPER 387 (¶32143 2001).

Evaluations

The Employer contends that the chiefs'/supervisor responsibility to complete written evaluations of the legal staff within their respective sections demonstrates supervisory status. Although the power to evaluate employees is not one of the statutory criteria for determining supervisory status, the Commission has considered its relationship to other personnel actions such as discipline, non-retention, promotions and salary increases and decreases. N.J. Turnpike Auth., P.E.R.C. No. 98-28, 23 NJPER 511 (¶28249 1997). A "supervisor's input" into subordinates' evaluations alone does not necessarily create a conflict of interest sufficient to exclude the employee from a unit of non-supervisors. Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987). See also Milltown Bd. of Ed., D.R. No. 2001-7, 27 NJPER 157 (¶32054 2001).

In Westfield, the Commission found that the claimed supervisors had no role in hiring, discharge or discipline. Their claimed supervisory status turned on their role in evaluating subordinate employees. Each of the "supervisors" prepared initial evaluations of subordinates, discussed the evaluations with their manager, who in turn added his own comments on the evaluations. The evaluations were then signed by both the "supervisor" and their manager. An evaluation conference was then conducted with the employee. None of the evaluations recommended any specific adverse personnel action. The Commission found that the supervisor's limited role in the evaluation process was insufficient to sustain a finding of statutory supervisory status or the presence of a conflict of interest. The Commission noted:

Recommendations for another's evaluations which might then serve as recommendations for another's personnel decisions are too far removed from the personnel decisions to create a conflict of interest substantial enough to remove the titles from the unit. Contrast Wilton v. West Orange Bd. of Ed., 57 N.J. 404 (1971). [Westfield, 13 NJPER at 637]

In Turnpike, certain toll and operations supervisors wrote evaluations of their subordinates. The Commission found that the evaluations were not used in a manner that would give rise to a finding of statutory supervisory authority.

Here, as in Westfield and Turnpike, the chiefs'/supervisor evaluations of the assistant prosecutors within their respective units do not amount to effective recommendations of discipline and

do not include recommendations for a specific personnel action. An "effective recommendation" occurs when the "supervisor's" recommendation is adopted without independent review and analysis by a higher level of authority. See Fairfield Tp., P.E.R.C. No. 92-115, 18 NJPER 299 (¶23127 1992); Westfield; Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶15102 1984), adopting H.O. No. 84-11, 10 NJPER 149 (¶15075 1984). In this case, the chiefs/supervisor do not write "independent" or effective recommendations on the evaluations. The evaluations are reviewed by the First Assistant, who regularly adds his written comments and recommendations and then signs the documents.

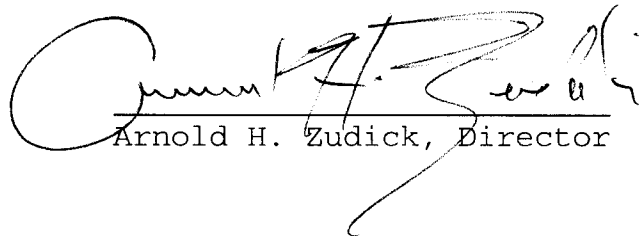
It is not clear from this record that the evaluations written by the chiefs/supervisor have a direct nexus to the employees' future salaries or assignments. Although their evaluations may be one of the elements the Prosecutor considers, it is just as likely the Prosecutor would also rely on the First Assistant's recommendations, including those set forth in the written evaluations. Moreover, the "recommendations" by the chiefs/supervisor -- including such comments as "this employee is deserving of financial rewards" and "this employee should be considered for promotion in the future" - are not specific enough to warrant a conclusion that a nexus exists between that recommendation and the employee obtaining a specific assignment, promotion, or merit pay raise.

Based upon the above, I find that the chiefs/supervisor do not regularly exercise statutory authority to hire, fire, discipline or effectively recommend the same with regard to the assistant prosecutors assigned to them. I find that they are not supervisors within the meaning of the Act. Accordingly, there is no basis to exclude them from the negotiations unit of assistant prosecutors.

ORDER

The Unit Clarification Petition is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick, Director

DATED: September 27, 2007
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by October 9, 2007.